No. 98-1297

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

JOSEPH NICHOLSON — PETITIONER

versus

COMMONWEALTH OF KENTUCKY
AND
ROBERT A. BIRD — RESPONDENTS

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

I. Whether the decision of the Kentucky Supreme Court in Commonwealth of Kentucky v. Bird, Ky., 979 S.W.2d 915 (1998) is in conflict with the decision of this Court in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

II. Whether the assessment of and payment by petitioner, Joseph Nicholson, of the Kentucky Controlled Substance Excise Tax bars subsequent criminal prosecution for possession or trafficking in the controlled substance on federal constitutional double jeopardy grounds.

III. Whether the double jeopardy analysis endorsed in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) should be expanded or limited.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; (2) Mr. Joseph Nicholson; and (3) Mr. Robert A. Bird. Mr. Bird has filed a separate certiorari petition in the United States Supreme Court, File No. 98-1331, to which the Commonwealth of Kentucky is filing a separate response.

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BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Comes the Commonwealth of Kentucky, by counsel, and pursuant to Order of this Court submits this brief in response to the petition for a writ of certiorari.

OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth at page 1 of the certiorari petition, as well as in the appendices referenced therein.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL PROVISION INVOLVED

The petitioner asserts the double jeopardy clause of the Fifth Amendment to the United States Constitution as the constitutional provision involved. That clause states in relevant part as follows: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

COUNTERSTATEMENT OF THE CASE

Kentucky does not quarrel with the facts as set forth in the petitioner's statement of the case. The petition correctly sets forth at page 3 the fact that Mr. Nicholson was taxed at a rate of $200 per gram of powdered cocaine. The petition incorrectly states at page 6, however, that the tax assessment was $400 per gram of controlled substance. Petitioner obtains this inflated figure by adding the late payment penalty to the $200 per gram assessment. A late payment penalty for the failure to timely pay a tax is an assessment separate from the tax assessment, itself.

ARGUMENT

I.

THE OPINION OF THE KENTUCKY SUPREME COURT IN COMMONWEALTH OF KENTUCKY V. BIRD, KY., 979 S.W.2D 915 (1998) IS NOT IN CONFLICT WITH THE OPINION OF THIS COURT IN MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994).

The specific issue addressed by this Court in its Kurth Ranch opinion was:

> . . . whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense.

Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 769, 114 S.Ct. 1937, 128 L.Ed.2d 767, 772-773 (1994). Conversely, the issue addressed by the Kentucky Supreme Court in Commonwealth v. Bird was, in relevant part:

> . . . whether a criminal defendant's payment of the Kentucky Controlled Substances Excise Tax (drug tax), KRS 138.870-.990, bars subsequent criminal prosecution on federal . . . double jeopardy grounds.

Commonwealth of Kentucky v. Bird, Ky., 979 S.W.2d 915 (1998). The Kurth Ranch opinion did not address "the question whether an ostensively civil proceeding that is [allegedly] designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character". Id., 511 U.S. 767, 781, 114 S.Ct. 1937, 128 L.Ed.2d 767, 780, at f.n. 21. The precise issue before the Kentucky Supreme Court in Commonwealth v. Bird was not addressed in the Kurth Ranch opinion.

Those anomalous features of the former Montana drug tax which were essential to the Kurth Ranch holding are not present in Kentucky's Controlled Substances Excise Tax Statutes (KRS 138.870-138.990). In United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549, 564 (1996), the United States Supreme Court summarized its Kurth Ranch holding as follows:

> In Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994), we considered whether a state tax imposed on marijuana was invalid under the Double Jeopardy Clause when the taxpayer had already been criminally convicted of owning the marijuana which was taxed. We first established that the fact that Montana had labeled the civil sanction a 'tax' did not end our analysis. We then turned to consider

> whether the tax was so punitive as to constitute a punishment subject to the Double Jeopardy Clause. Several differences between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: thus, only a person charged with a criminal offense was subject to the tax. We also noted that the taxpayer did not own or possess the taxed marijuana at the time that the tax was imposed. From these differences, we determined that the tax was motivated by a '"penal and prohibitory intent rather than the gathering of revenue.'" . . . Concluding that the Montana tax proceeding 'was the functional equivalent of a successive criminal prosecution.' we affirmed the Court of Appeals' judgment barring the tax . . .

(Emphasis added).

Kentucky's Controlled Substances Excise Tax does not subject only those charged with a criminal offense to taxation. The tax is due and payable regardless of whether one has been charged with a criminal offense. KRS 138.874(1); 138.870(4). Even though the activity taxed is illegal activity, not all such illegal activity is taxed. KRS 138.870(4). Unlike the former Montana tax, the Kentucky tax becomes due and payable at a time when the taxpayer has ownership or possession of the taxed controlled substance.

An excise tax such as Kentucky's, which is imposed as a matter of law the minute the taxpayer first owns or possesses the taxed substance, without regard to whether any criminal charges have been filed, does not implicate Kurth Ranch double jeopardy concerns. By contrast, the former Montana controlled substances tax was in the nature of a property tax. It was not imposed until the taxpayer was arrested on a criminal charge relating to the taxed substance. It was not assessed until after the taxpayer had been dispossessed of the taxed substance.

Kentucky's controlled substances tax was enacted into law as Chapter 315 of the 1994 Kentucky Acts, and subsequently was codified at KRS 138.870-138.990. Chapter 315 was titled "AN ACT relating to revenue and taxation". The preamble to that enactment, representing the collective voice of the Kentucky Legislature, sets forth a rational basis for the enactment of the revenue raising measure:

> WHEREAS, the General Assembly finds and declares that illegal drugs are damaging to the health, safety, and welfare of the citizens of the Commonwealth; and

> WHEREAS, the costs to the Commonwealth and its citizens resulting from the use of illegal drugs is substantial; and
>
> WHEREAS, dealers of illegal drugs in this state should be required to reimburse the Commonwealth for its cost associated with conducting drug abuse education, prevention, treatment, and law enforcement programs . . .

Secondarily, Chapter 315 of the 1994 Kentucky Acts might be characterized as a remedial measure. That characterization, however, would not necessarily implicate double jeopardy concerns. Precisely because "even remedial sanctions carry the sting of punishment", the question of whether a particular sanction constitutes punishment is not determined from a defendant's perspective. Kurth Ranch, supra, 511 U.S. 767, 777, 114 S.Ct. 1937, 128 L.Ed.2d 767, 777 (1994), at f.n. 14.

At pages 8-9 of the certiorari petition, the petitioner makes much of a phrase lifted from a Kentucky House of Representatives Committee Meeting in which the sponsors of Kentucky's Controlled Substances Excise Tax Bill explained that a purpose of the bill was "to take the profit out of drug trafficking". That statement is as consistent with an intent to remove the financial incentive to engage

in drug trafficking as it is with any intent to impose the functional equivalent of criminal punishment.

Liability under Kentucky's Controlled Substances Excise Tax will arise as a matter of law in most, if not all, cases before the individual engaged in taxable activity is arrested, charged with a criminal offense, and dispossessed of the controlled substances. (It, of course, is conceivable that the individual engaged in the taxable activity may never be detected, charged with a criminal offense, and dispossessed of the goods). If an individual timely pays the tax and is unable to pass the additional cost on to others, the only "punishment" he suffers as a result of payment is an inability to profitably engage in an illegal activity.

Those engaged in lawful businesses can, and do, pass taxes on to the consumer or others in the chain of distribution. One reason the result is different with respect to much of the activity taxed by Kentucky's Controlled Substances Excise Tax is that persons engaged in such activity do not generally operate openly and visibly, and hence are more readily capable of evading the tax. The Kentucky's

Controlled Substances Excise Tax, at least theoretically, is capable of being passed on through the chain of distribution.

A tax does not cease to be a tax merely because large numbers of taxpayers may dodge timely payment.

The opinion of the Kentucky Supreme Court in Commonwealth v. Bird does not conflict with the Kurth Ranch opinion.

II.

THE ASSESSMENT OF AND PAYMENT BY MR. NICHOLSON OF THE KENTUCKY CONTROLLED SUBSTANCES EXCISE TAX DOES NOT BAR A SUBSEQUENT CRIMINAL PROSECUTION FOR POSSESSION OR TRAFFICKING IN THE CONTROLLED SUBSTANCE ON FEDERAL CONSTITUTIONAL DOUBLE JEOPARDY GROUNDS.

To conclude that payment of Kentucky's controlled substances tax operates as a double jeopardy bar to a criminal prosecution for trafficking in the controlled substance, one must first conclude: (1) that the payment of the Kentucky controlled substance tax is the functional equivalent of a criminal prosecution; (2) that there is an identity of a tax "offense" and the criminal offense; and (3) that an

initial constitutional jeopardy bar attaches as the result of a tax which on its face subjects the taxpayer to neither loss of life or liberty.

Payment of Kentucky's Controlled Substance Tax is not the Functional Equivalent of a Criminal Prosecution.

The Court in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) conceded that the Court had never before held that a tax violated the Double Jeopardy Clause. Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 778. The Kurth Ranch Court conceded that the unlawfulness of an activity does not prevent its taxation. Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 778. The Kurth Ranch Court ultimately concluded that Montana's drug tax "is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis". Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 781.

In the recent case of Hudson v. United States, 522 U.S. ___, 118 S.Ct. ___, 139 L.Ed.2d 450 (1997), the United States Supreme Court noted that it had applied in Kurth Ranch a test similar to that set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9

L.Ed.2d 644 (1963). Hudson, supra, 139 L.Ed.2d at 461, fn. 6. The Hudson Court summarized the "guideposts" set forth in Kennedy for determining whether an ostensibly civil remedy is transformed into a criminal penalty as follows:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment--retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." Hudson, supra, 139 L.Ed.2d at 459.

The Hudson court further noted that the foregoing "factors must be considered in relation to the statute on its face", and that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty". Id., 139 L.Ed.2d at 459 (internal citations and internal quotation marks omitted).

The Kentucky statutes, duly enacted by the Kentucky Legislature, denominate Kentucky's controlled substances tax as a tax, not a criminal penalty.

With this in mind, we turn to the "guideposts" established in the Kennedy case, supra, and applied in the Hudson case, supra. Kentucky's tax does not involve an affirmative disability or restraint as those terms are "normally understood". Hudson, supra, 139 L.Ed.2d at 462. The tax is "certainly nothing approaching the 'infamous punishment' of imprisonment". Id., 139 L.Ed.2d at 462, quoting from Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435, 1448 (1960).

Taxes have not historically been regarded as a criminal punishment.

The Kentucky controlled substance tax contains no scienter requirement. KRS 138.870(4).

Admittedly, Kentucky's tax may serve a deterrent function, a traditional aim of punishment. The Kurth Ranch court noted, however, "neither a high rate of taxation nor an obvious deterrent purpose automatically marks...[a]... tax a form of punishment". Id.,

128 L.Ed.2d at 779. Indeed, a statute may serve a remedial purpose without constituting punishment for purposes of a double jeopardy analysis. See, e.g., Kurth Ranch, supra, 128 L.Ed.2d at 778, f.n. 16.

Admittedly, Kentucky's controlled substance tax applies to substances which it is not legal to possess, but the Kentucky controlled substance tax is due and payable regardless of whether the taxpayer has been charged with or convicted of a crime. KRS 138.870(4); 138.874(1). Moreover, the Kentucky statutes expressly provide for anonymous payment of the tax and further preclude the use of tax information in a criminal prosecution. KRS 138.874(1) and (2); KRS 138.886(1) and (2).

The Kentucky General Assembly has set forth a rational basis for establishing the tax. The preamble to the bill establishing Kentucky's controlled substances excise tax states:

> WHEREAS, the General Assembly finds and declares that illegal drugs are damaging to the health, safety, and welfare of the citizens of the Commonwealth; and
>
> WHEREAS, the costs to the Commonwealth and its citizens resulting from the use of illegal drugs is substantial; and

> WHEREAS, dealers of illegal drugs in this state should be required to reimburse the Commonwealth for its cost associated with conducting drug abuse education, prevention, treatment, and law enforcement programs . . .

Finally, the tax is not clearly excessive in relation to the purpose for the tax set forth in the preamble to Chapter 315 of the Kentucky Acts (1994). Indeed, the Kurth Ranch court acknowledged that the Court had sustained a "steep $100-per-ounce federal tax on marijuana in United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950)". Kurth Ranch, supra, 511 U.S. at 781, 114 S.Ct. at ____, 128 L.Ed.2d at 779.

Although there is a split among the state courts concerning the proper interpretation of the Kurth Ranch decision, a number of states which have considered the question have concluded that their controlled substances taxes do not implicate double jeopardy concerns under the Kurth Ranch holding. Those states are Alabama, Connecticut, Iowa, Kansas, North Carolina, Nebraska, Oklahoma and South Carolina. Milner v. State, 658 S.2d 500 (Ala. 1994); Covelli v. Commissioner of Revenue Services, 668 A.2d 699 (Conn. 1995), vacated and remanded at 116 S.Ct. 2577, reaffirmed at 683 A.2d 737,

cert. den. at 137 L.Ed.2d 551; State v. Sumpert, 554 N.W.2d 250 (Iowa 1996); State v. Lange, 531 N.W.2d 108 (Iowa 1995); State v. Gulledge, 896 P.2d 378 (Kan. 1995); State v. Jensen, 915 P.2d 109 (Kan. 1996); State v. Ballenger, 472 S.E.2d 572 (N.C.App. 1996), affirmed at 481 S.E.2d 84, cert. den. at 137 L.Ed.2d 551; [Contra, Lynn v. West, 134 F.3d 582 (4th Cir. 1998)]; State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996); Hill v. State, 898 P.2d 155 (Okl. Cr. 1995); McMullin v. South Carolina Department of Revenue and Taxation, 469 S.E.2d 600 (S.C. 1996).

At least one federal circuit has issued an opinion consistent with the foregoing state cases. Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998) (cert. petition pending).

A tax such as Kentucky's, which is imposed the minute the taxpayer first owns or possesses the taxed substance, without regard to whether any criminal charges have been filed, may fairly be said not to be the functional equivalent of a criminal prosecution. This is particularly true given the deference which customarily is accorded legislative bodies in legislative matters.

Even if Kentucky's Tax is the Functional Equivalent of a Criminal Prosecution, There is no Identity of Offenses.

There is no identity of offenses pursuant to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger analysis applies in both the multiple punishment and multiple prosecution contexts. Witte v. United States, 515 U.S. ___, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995).

Even if Kentucky's controlled substance tax statute were deemed to punish a criminal offense, it does not "punish" the same "offense" as the criminal statute (KRS 218A.1412) pursuant to which Mr. Bird and Mr. Nicholson were charged in the case at bar. Liability for the Kentucky controlled substances tax arose by operation of law prior to the arrest of Mr. Bird and Mr. Nicholson. KRS 138.174(1). Criminal liability under KRS 218A.1412 arose when Mr. Bird and Mr. Nicholson were arrested. The Kentucky controlled substances tax, unlike the criminal statute, contains no scienter requirement. KRS 138.870(4); KRS 218A.1412. KRS 218A.1412 imposes liability for trafficking in any amount of a controlled substance. Kentucky's controlled substances tax, however, requires proof of the producing,

cultivating, manufacturing, importing, transporting, distributing, acquiring, purchasing, storing, selling, using, or otherwise possessing at least seven grams of a controlled substance or fifty or more dosage units. KRS 138.870(4).

III.

MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994) SHOULD BE LIMITED TO ITS FACTS, ABROGATED OR OVERRULED.

When jeopardy initially attaches in a criminal prosecution, then punishment imposed in an ostensibly civil proceeding which is the functional equivalent of a criminal prosecution may violate double jeopardy principles. Jeopardy clearly attaches initially in the criminal proceeding.

Undersigned counsel knows of no United States Supreme Court case or Kentucky Supreme Court case which has held that a civil proceeding which subjects an individual to neither loss of life or liberty nevertheless raises a jeopardy bar to a subsequent criminal prosecution because the civil proceeding is the "functional equivalent" of a criminal prosecution. If there is no initial jeopardy

under the federal or state constitutions, then there can be no double jeopardy.

No sound reasons exist for extending the Kurth Ranch holding beyond the facts of that case. As the United States Supreme Court recently noted in the Hudson case, supra, "[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational". Id., 139 L.Ed.2d at 461. As the Hudson court further noted:

> The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and non-punitive" penalties. Id., 139 L.Ed.2d at 461.

The Kurth Ranch opinion has been the subject of extensive litigation in state and federal courts. Should the Court grant certiorari review in the case at bar, the Court is requested to limit abrogate or overrule the Kurth Ranch double jeopardy analysis. Application of a double jeopardy analysis to tax enactments presents the same pitfalls as does application of a double jeopardy analysis to civil penalties.

CONCLUSION

WHEREFORE, certiorari review should be denied.

Respectfully submitted,

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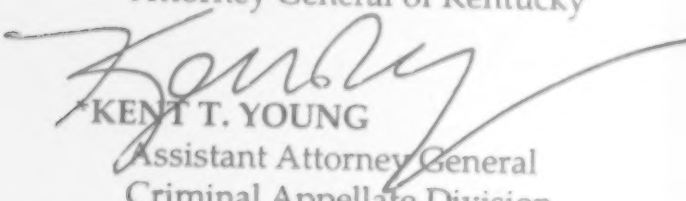

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